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Supreme Court of the United States

OCTOBER TERM, 1912

IN RE CITY OF LOUISVILLE, KENTUCKY, PETITIONER

BRIEF ON MOTION TO FILE PETITION FOR MANDAMUS

PENDLETON BECKLEY,
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J. W. S. CLEMENTS,
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Of Counsel.

THE STANDARD PRINTING CO., INCORPORATED, LOUISVILLE.

Supreme Court of the United States

OCTOBER TERM, 1912

IN RE CITY OF LOUISVILLE, KENTUCKY, . . *Petitioner.*

BRIEF ON MOTION TO FILE PETITION FOR MANDAMUS.

May It Please the Court:

On the motion to file the petition herein, we respectfully submit the following brief suggestions:

The only question raised by this petition is as to whether the Judge of the District Court has misconstrued the opinion of this Court as reported in the case of Louisville vs. the Cumberland Telephone and Telegraph Company, 225 U. S., 430.

The one issue made on the Bill of Complaint filed in that case in March, 1909, was as to whether the ordinance of March 6, 1909, was confiscatory as to the telephone company.

By referring to the Bill of Complaint (page 14 of Record No. 197, October Term, 1911), it will be found that the complainant charged that the ordinance was

confiscatory as to it as of the 6th day of March, 1909. The answer put this allegation in issue and on final hearing, the lower court upheld the contention of the complainant and perpetually enjoined the defendant from enforcing the rate ordinance in question. This court by its opinion reversed the decree of the lower court. In so reversing that decree, Your Honors adhered to the opinions handed down in the Knoxville Water Company case and the Consolidated Gas Company case.

The opinion in the Louisville case is very short. It reviewed the facts briefly and wound up with this laconic sentence: "Decree reversed without prejudice."

When the case came back to the lower court, the city on September 28, 1912, moved the court for an order requiring the telephone company to make restitution to its patrons of all sums which had been collected by it in excess of the ordinance rates, and for the appointment of a Master to ascertain the amount so unlawfully collected and the names of the persons who were entitled to restitution. This motion was sustained, and the order of reference copied in the petition herein on page 5 is the order which was accordingly entered. No further step of any kind was taken in the case until sometime in February, 1913, when the Judge of the District Court notified counsel that he intended to enter an order appointing a Master to ascertain whether the telephone company was operating under the ordinance rates, and whether it was or was not earning sufficient money under

those rates to justify the Court in saying that those rates were not confiscatory as to the telephone company. The city, through its counsel, objected vigorously to the appointment of any such Master or to any such investigation being made, contending that this particular case was at an end insofar as the charge of confiscation was concerned. The lower court disregarded the objection of the city, and of its own motion, entered the order of reference which is copied on page 8 of the petition.

The Court was not requested by the telephone company or by any party to make any such order and in the opinion filed at the time the order was made, the Court stated that as it construed the opinion of this Court in 225 U. S., that opinion directed the District Court to make the inquiry which the order of reference then made called for.

The order entered by the District Court is clearly the result of a misinterpretation of the opinion of this court; and, such being the case, your petitioner is entitled to an order commanding the Judge of that court to refrain from proceeding further under such misinterpretation.

That the Judge of the District Court has misconstrued the opinion of this Court, as reported in 225 U. S., is shown not only by referring to the opinion itself, but by a reference to other opinions of this court wherein the same principle of law was announced.

Take for instance the Knoxville Water Company case, 212 U. S., page 18. That was a case wherein the

principle of law was first laid down that the courts should not declare a rate ordinance confiscatory until the public service corporation had given it a fair trial. In concluding the opinion in that case this Court said:

> "If hereafter it shall appear, under the actual operation of the ordinance, that the returns allowed by it operate as a confiscation of property, nothing in this judgment will prevent *another application to the Courts of the United States or to the Courts of the State of Tennessee.*"

Accordingly the decree was reversed, the following language being used by the Court:

> "The decree is reversed and the case remanded to the Court below with directions to dismiss the bill without prejudice."

In Willcox vs. Consolidated Gas Company, 212 U. S., 19, the same principle of law was announced, this Court using the following language:

> "It may possibly be, however, that a practical experience of the effect of the Acts by actual operation under them might prevent the complainant from obtaining a fair return as already described, and in that event, complainant ought to have the *opportunity of again presenting its case to the Court.* To that end, we reverse the decree, with directions to dismiss the bill without prejudice, and *it is so ordered.*"

In the Louisville case, the principle laid down in the Knoxville Water Company case and the Consolidated

Gas Company case was followed in a very brief opinion which wound up as follows:

> "The whole question is too much in the air for us to feel authorized to let the injunction stand. Decree reversed without prejudice."

It is the contention of the City of Louisville that by the opinions in these three cases this Court meant identically the same thing; that is to say, inasmuch as the complainants had not shown by clear and unmistakable proof that the rates in question would be confiscatory, the Court would not affirm decrees enjoining the enforcement of such rates until the public service corporation had put the rates into effect, and given them a fair trial. In the meantime, it was clearly the purpose and intention of this Court in writing those three opinions that the decrees of the lower court should be reversed, and the cases dismissed insofar as the question of confiscation was concerned; but if any one of those three public service corporations saw fit in the future, and after testing the rates, to again try out the question of whether the ordinance was or was not confiscatory, its right to do so should not be prejudiced by anything contained in the opinions of this Court or the decrees entered pursuant thereto.

The principle of law on which these three cases were decided has been involved in only one other case. We refer to the case of the Northern Pacific Railway Com-

pany vs. North Dakota, 216 U. S., 579. That was a case in which the Attorney-General of North Dakota brought suit against the Northern Pacific Railway Company seeking a mandatory injunction to compel the railway company to put into effect certain railroad rates fixed by the State of North Dakota. The lower court granted the mandatory injunction. The Northern Pacific appealed from that decree to this Court. This Court affirmed the lower court on the theory that the Northern Pacific, having never tried out the rates fixed by the State of North Dakota, was not in a position to show the Court that the rates were clearly confiscatory. In affirming the judgment of the lower court, this Court said:

> "It seems to us that the nearest approach to justice that can be made at this time is to follow the precedent of Wilcox vs. The Consolidated Gas Company, 212 U. S., 19, as nearly as may be, and affirm the decree, but without prejudice to the right of the railroad company to reopen the case by appropriate proceedings if, after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rates for coal. *Decree affirmed without prejudice.*"

In the Northern Pacific case the facts arose in a different manner from that in which they arose in any of the other three cases. In that case the railroad disregarded the law and the State sought to have the courts compel it to obey the law. The lower court entered a

decree commanding the railroad company to put into effect the rates in question. Had this Court affirmed that decree with nothing more, the railroad company would have been forever enjoined from seeking to have those rates declared confiscatory inasmuch as the decree would have been final and would have been *res adjudicata* as between the parties. There was no way whereby this Court could affirm the decree of the lower court and permit the railroad company to question the legality of the rates, except by directing the District Court to retain the case on the docket for a reasonable length of time in order to permit the railroad company to come into that case and test the legality of those rates.

But even in the Northern Pacific case, the Court did not direct the District Court to appoint its Master to enforce the rates or on its own motion to ascertain how much the railroad company was earning under those rates. It simply directed the lower court not to dismiss the bill for a reasonable length of time in order to give the railroad company an opportunity to file another petition in the case if, after operating under those rates, it thought it could show conclusively that the rates were confiscatory.

In the case at bar, the District Judge, not content to let the parties practice their own case, not content to wait until the telephone company had tried out the rates and had again presented a petition charging that the rates were confiscatory as shown by an actual test of

them, not content to wait until some party to the litigation asked for the appointment of a Master to examine into and report on the question of whether the telephone company had or had not earned money from operating its plant with the rates in force; of his own motion brought in an opinion wherein he stated that from reading the opinion of this Court he had reached the conclusion that this Court had directed him to supervise the operations of the telephone plant, to enforce an ordinance of the City of Louisville, to determine whether the rates fixed in that ordinance were or were not fair to the telephone company, and to determine how much money the telephone company had expended in operating its plant and what were its gross and net earnings.

The terms of the order of reference itself show that the position of the District Judge is absolutely untenable. For instance in the first order of reference (see Petition, page 5), the Court directed the Master to ascertain the amount collected by the telephone company from the patrons in excess of the ordinance rates "between the time the temporary injunction *pendente lite* went into effect, viz., on March 8, 1909, and July 1, 1912, *at which latter date counsel agree that the ordinance rates were put into effect by the complainant.*"

In the second order of reference (see Petition, page 9), the Master is directed to ascertain and report: "(a) Whether on or about July 1, 1912, or at any other later date, the complainant put into operation the rates for

telephone service in the City of Louisville prescribed by said city in the ordinance approved March 6, 1909."

In other words, in the first order, the court recites the fact that the parties have agreed that the ordinance rates went into effect on July 1, 1912, and yet subsequently appoints a Master to ascertain whether those rates actually did go into effect on that date.

It was no concern of the Judge of the District Court whether the rates had or had not gone into effect, unless some party to the litigation, by motion or rule, presented the matter to him for action.

No party to the litigation complained that the ordinance rates were not in effect; and even if complaint had been made by the city, it would not have been within the province of the District Court to enforce that ordinance. By virtue of the ordinance itself a penalty was provided for its violation. If the city had asked the District Court for a rule compelling the telephone company to put into effect the rates that Court should have overruled such motion and have referred the city to its Ordinance Court to enforce the terms of the ordinance.

Again, in the present status of the case, what concern is it of the District Court as to what are the gross and net earnings of the telephone company from its property in the City of Louisville?

If the telephone company desires to again question those rates, undoubtedly it can file another bill of complaint in the District Court or it may elect to file its bill

in the State Court. In any event the telephone company will necessarily be the moving party. In such a case it can present the evidence on which the Court is asked to act in reaching a conclusion as to whether or not those rates are then confiscatory. In such a proceeding the city will have an opportunity to examine the records, cross-examine witnesses and itself produce proof. But in the proceedings which the District Judge has instituted, the Master is simply to supervise the operations of the telephone plant and to report to the Court what the telephone company has earned under the rate ordinance, and on this report the District Court will enter its decree. Such a proceeding, we submit, is unheard of in the history of rate legislation, and especially objectionable when the Master so appointed is the Clerk of the District Court, disqualified from acting, and appointed over the protest of the city whose ordinance is being questioned.

What would Your Honors say of a District Judge who would entertain jurisdiction of a cause in which a public service corporation alleged that it was ignorant of whether certain rates fixed by a legislative body were confiscatory as to it, that it had put the rates into effect and it now filed its bill of complaint for the purpose of having the Court appoint a Master to see if those rates were really in effect, to supervise the operations of the company, and to report to the Court the gross earnings.

gross expenses and net revenues of the company; and asked the Court to determine from such a report whether the rates were or were not confiscatory?

We apprehend that a District Court would refuse to act under such circumstances. It would properly say:

> "We have nothing to do with operating your plant or with your earnings or expenses. We have no jurisdiction of a cause such as the one you present except where it is charged that the rates are confiscatory. When you have tested the rates and are prepared to show the Court conclusively that your property is being confiscated then will be the time for you to file your bill. Then and not until then will the Court entertain jurisdiction of such a cause."

For the Court to hold otherwise would be to place an undue burden not only on the defendant but on the Court. It would be extending the province of a Chancery Court far beyond the established rules of equity.

And yet Judge Evans not only did all these things, but he did them in a cause which this Court had in effect directed him to dismiss—a cause moreover wherein the public service corporation did not even request such supervision.

For these reasons we respectfully submit that the motion to file the petition should be sustained, the petition filed, and the rule awarded.

Respectfully submitted,

PENDLETON BECKLEY,

Attorney for Petitioner.

J. W. S. CLEMENTS,
STUART CHEVALIER,

Of Counsel.

Office Supreme Court,
FILED.
OCT 14 1913
JAMES H. McKEN

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 11, Original.

IN RE CITY OF LOUISVILLE, KENTUCKY, *Petitioner.*

MOTION TO FILE EXHIBITS.

Comes the petitioner, City of Louisville, Kentucky, and tenders herewith copies of certain pleadings and papers which have been filed since this proceeding was instituted, and which have become a part of the record in the case of Cumberland Telephone & Telegraph Company v. City of Louisville, referred to in the petition, and which are pertinent on the hearing of the motion for the writ of mandamus; and moves the Court for an order filing said exhibits as a part of the petition.

PENDLETON BECKLEY,
J. W. S. CLEMENTS,
STUART CHEVALIER,
Attorneys for City of Louisville, Kentucky, Petitioner.

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IN RE CITY OF LOUISVILLE, KENTUCKY, *Petitioner.*

NOTICE.

To the Honorable Walter Evans, Judge of the United States District Court for the Western District of Kentucky—Sir:

You are notified that the petitioner in the above styled cause will on October 13, 1913, or on the day following when motions are called for in said Court, move the said Court for an order allowing it to file as exhibits with the petition certain pleadings and papers in the case of Cumberland Telephone & Telegraph Company v. City of Louisville, referred to in said petition and which have become a part of the record in said case since the above proceeding was instituted.

PENDLETON BECKLEY,
J. W. S. CLEMENTS,
STUART CHEVALIER,
Attorneys for the City of Louisville, Kentucky, Petitioner.

Notice accepted:

HUNT CHIPLEY,
WM. L. GRANBERY,
ALEXR. POPE HUMPHREY,
For Respondent.

IN RE CITY OF LOUISVILLE, KENTUCKY, PETITIONER.

PETITION FOR WRIT OF MANDAMUS.

No. 11, Original. Argued November 10, 1913.—Decided January 5, 1914.

The mandate in the case of *Louisville* v. *Cumberland Telephone Co.*, 225 U. S. 430, in which this court decided that the rates established by municipal ordinance were not confiscatory and reversed the judgment holding that they were, without prejudice, and remanded the case to the lower court, permitted further proceedings; and the judge of the District Court acted within his discretion in continuing the case and appointing a Master to take proof and report as to the amount collected by the company during the injunction period and also after the new rates had been put into effect.

Mandamus to compel the District Court to vacate supplemental orders of reference made in a case reversed and remanded, refused, on the ground that the case was decided without prejudice and the District Court acted within its discretion in the conduct of the case and the interpretation of the mandate.

THE facts, which involve the proper exercise of discretion of the trial judge in interpreting the mandate of this court in a case remanded for further proceedings, are stated in the opinion.

Mr. Pendleton Beckley, with whom *Mr. J. W. S. Clements* and *Mr. Stuart Chevalier* were on the brief, for petitioner:

Where a decree of this court has been misunderstood or misconstrued by a lower court, the party complaining can have the error corrected either by an appeal to this court or by a motion for a writ of mandamus. *City National Bank* v. *Hunter*, 152 U. S. 512. See also *Whitaker* v. *Desfosse*, 7 Bosw. (N. Y.) 678; *Cram* v. *Bradford*, 4 Abb. Pr. R. 193; *St. Paul & Sioux City* v. *Gardner*, 19 Minnesota, 132, 136; 2 Cyc. 612, 613, and cases cited.

In any event a writ of mandamus is proper to bring before this court the question whether its opinion or mandate has been misconstrued by a lower court. *Perkins* v. *Fourniquet*, 14 How. 328; *Gaines* v. *Caldwell*, 148 U. S. 228; *Re Sanford Fork & Tool Co.*, 160 U. S. 247; *Re Potts & Co.*, 166 U. S. 263.

The city contends that the District Court should retain jurisdiction of this case for the purpose (but for the purpose only) of decreeing restitution to the patrons of the telephone company of the amount of overcharges accruing from the passage of the rate ordinance to the filing of the mandate of this court upholding that ordinance. *Brown* v. *Detroit Trust Co.*, 193 Fed. Rep. 626; *Northwestern Fuel Co.* v. *Brock*, 139 U. S. 216; *Southern Railway Co.* v. *Tift*, 206 U. S. 435, and see report of the subsequent hearing in *Tift* v. *Southern Railway Co.*, 159 Fed. Rep. 555.

Respondent in ordering another investigation of the rates and the supervision by a special Master of the operations of the telephone company, misconstrued or misunderstood the opinion of this court rendered on the former appeal.

The one issue made in the bill of complaint filed in this case in March, 1909, was whether the ordinance of March 6, 1909, was confiscatory as to the telephone company.

This court by its opinion reversed the decree of the lower court. In so reversing that decree this court adhered to the opinions in *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, and *Knoxville Water Company Case*, 212 U. S. 18, that the courts should not declare a rate ordinance confiscatory until the public service corporation had given it a fair trial.

The City of Louisville contends that by the opinions in each of these cases this court meant identically the same thing; that is to say, inasmuch as complainants had not shown by clear and unmistakable proof that the rates in question would be confiscatory, the court would not

affirm decrees enjoining the enforcement of such rates until the public service corporations had put the rate into effect, and given them a fair trial. In the meantime, it was clearly the purpose of this court in those cases that the decrees of the lower court should be reversed, and the cases dismissed in so far as the question of confiscation was concerned; but if any one of those three public service corporations saw fit in the future, and after testing the rates, to again try out the question of whether the ordinance was or was not confiscatory, its right to do so should not be prejudiced by anything contained in the opinions of this court or the decrees entered pursuant thereto.

See also *Northern Pacific Ry. Co.* v. *North Dakota*, 216 U. S. 579.

There is no possible ground on which a court can entertain jurisdiction of a cause in which a public service corporation alleged that it was ignorant of whether certain rates fixed by a legislative body were confiscatory as to it, that it had put the rates into effect and it now filed its bill of complaint for the purpose of having the court appoint a master to see if those rates were really in effect, to supervise the operations of the company, and to report to the court the gross earnings, gross expenses and net revenues of the company; and asked the court to determine from such a report whether the rates were or were not confiscatory.

Mr. Alexander P. Humphrey and *Mr. W. L. Granbery*, with whom *Mr. Hunt Chipley* was on the brief, for respondent.

Mr. Justice McKenna delivered the opinion of the court.

Petition for a rule on the Judge of the District Court of the United States for the Western District of Kentucky,

to show cause why a mandamus should not issue commanding him to vacate the supplemental order of reference entered on March 10, 1913, in the cause entitled *Cumberland Telephone & Telegraph Company* v. *City of Louisville*, pending in said District Court, and to desist from further trying in the cause the question whether the ordinance of March 6, 1909, in litigation in the cause, is confiscatory and void as to the company, and further commanding him to dismiss the bill of complaint, retaining the same on the docket, however, for the purpose of ascertaining the amounts collected by the company from its patrons in the City of Louisville in excess of the rates prescribed in the ordinance, and for the further purpose of distributing the same among the persons entitled thereto.

A rule was issued in accordance with the petition and return thereon duly made by the District Judge.

The suit referred to was brought by the Telephone & Telegraph Company against the city in the Circuit Court, the predecessor of the District Court, on the eighth of March, 1909, and sought an injunction enjoining the City of Louisville from enforcing the ordinance referred to on the ground that the rates prescribed by it were confiscatory. Upon the filing of the bill a temporary restraining order was granted. A motion was also made for an injunction *pendente lite* but was not passed upon till final hearing on the twenty-fifth of April, 1911, when a permanent injunction was decreed, the court adjudging the rates fixed to be confiscatory.

On the fifteenth of June, 1909, the city moved for an order requiring the company to pay into court all sums collected in excess of those fixed in the ordinance. Thereupon the company agreed that if the court make no order in pursuance of the motion it would keep an accurate account of the sums collected in excess of the rates fixed in the ordinance and would, on the final hearing, pay the amounts into court for distribution among those entitled thereto,

provided the ordinance was not declared to be confiscatory. In pursuance of the agreement the court refrained from making the order prayed for and allowed the restraining order to remain in force.

An appeal to this court was taken by the city from the decree of perpetual injunction and the decree was reversed. 225 U. S. 430. This court reviewed the evidence upon which the Circuit Court decided that the rates were confiscatory, and said (p. 436):

"We express no opinion whether to cut this telephone company down to six per cent. by legislation would or would not be confiscatory. But when it is remembered what clear evidence the court requires before it declares legislation otherwise valid void on this ground, and when it is considered how speculative every figure is that we have set down with delusive exactness, we are of opinion that the result is too near the dividing line not to make actual experiment necessary. The Master thought that the probable net income for the year that would suffer the greatest decrease would be 8.60 per cent. on the values estimated by him. The Judge on assumptions to which we have stated our disagreement makes the present earnings 5-10.17 per cent. with a reduction by the ordinance to 3-6.17 per cent. The whole question is too much in the air for us to feel authorized to let the injunction stand.

"Decree reversed without prejudice."

A mandate was issued, the material parts of which are as follows:

"On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed with costs, without prejudice; and that the said defendant, City of Louisville, recover against the said complainant Three thousand nine hundred and forty-five dollars and sixty-five cents for its costs herein expended and have execution therefor.

"And it is further ordered that this cause be, and the same is hereby, remanded to the District Court of the United States for the Western District of Kentucky for further proceedings not inconsistent with the opinion of this Court."

On the return of the case to the District Court, as successor of the Circuit Court, in obedience to the mandate, the original decree was set aside and the case restored to the docket. Subsequently on motion of the city, the court appointed a special master to take proof of and report the amount, with interest, collected by the company in excess of the rates fixed by the ordinance. Power was given to the master to subpœna witnesses and examine the books and records of the company. A motion of the city to require the company to pay the amount into the court was postponed. A motion of A. Englehard & Sons Company for leave to file a bill of intervention was set for hearing November 12, 1912. The master proceeded to the execution of his duties under the order, but had not completed them at the time the petition herein was filed. The sums in excess of the rate will aggregate more than $100,000.

On March 10, 1913, the District Court (it is alleged, without any motion being made or any further steps taken by any party to the cause), on its own initiative, entered a supplemental order of reference wherein the clerk of the court was appointed a special master to ascertain and report the gross earnings of the company after the rate ordinance went into effect, the gross expenses incurred in operating its property and the net income derived by the company from operating its plant since the ordinance was put into effect.

The court justified this order by its interpretation of the opinion and mandate of this court. The city protested against the entry of the order, denying that it was a proper interpretation of the opinion of this court and insisted

that the District Court, in response to the bill of complaint, should "adjudge that the ordinance in question was not confiscatory and that the complainant take nothing by its bill." And it is now alleged that the cause is at an end so far as the rights of the company to have the ordinance adjudged confiscatory and void are concerned and that the District Court has no further jurisdiction; that the trial of the issue cost the city $20,000, and a new trial will cost it the same sum, and that no appeal can be taken until such trial be had; and, having no adequate remedy but mandamus, the petitioner prays that one issue to require the Judge to vacate his order and to desist from further trying the issue.

It is alleged that the special master who was appointed to ascertain the amounts collected by the company is ready to make his report and will make it in a short time.

It is further alleged the amounts collected in excess of the ordinance are a trust fund held by it for the benefit of the patrons of the company as their rights may appear and that they are entitled to have restitution made to them by the District Court, and that therefore the litigation between the company and the city should not be dismissed absolutely, but should be retained on the docket for the purpose of having collected and distributed the excessive collections. And this relief is prayed in addition to the mandamus.

Due return to the rule was made. It is, in effect, that the court considered the opinion and decree of this court permitted a discretion to retain the case for an actual experiment of the rates, and, thus considering it, made the order of March 10, 1913.

We think the discretion was properly exercised. The terms of the mandate permitted further proceedings, and it is well to recall what had been done. The decree of this court was rendered June 7, 1912. The Telephone Company put the ordinance rates into effect July 1, 1912.

On motion of the City a special master was appointed to take proof and report the amount collected by the company between the latter date and March 8, 1909, and, subsequently after an interchange of views between court and counsel, the order of March 10, 1913, was made. It will be observed, therefore, that an actual experiment of the rates had been voluntarily undertaken and had been in effect for more than eight months before the order under review was entered, and the court conceived that observation of the experiment might secure greater accuracy and confidence in the result, and, besides, inform the court of matters as they progressed.

We repeat, we think the court did not exceed the discretion permitted, and the rule is

Discharged.